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Naval War College.

SUMMER OF 1895.

INTERNATIONAL LAW.

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DISCUSSION OF FIRST SITUATION.

A practice has grown up of late years of the continuance of a pursuit of a merchant vessel, having on board a person or persons guilty of violating the municipal law of a state, beyond the territorial waters of such state and there seizing her for the violation of municipal law. This seizure and arrest, duly made by a public vessel of the state concerned, is permissible so far as merchant vessels are concerned, without regard to their nationality.

This exception to the general rule of the freedom of the high seas is not so much conceded as a matter of theory as a matter of fact, and as a matter of practice only in what might be termed hot-handed pursuit and attempted escape from a fresh violation of the law of the country of the pursuer.

It is understood that the escape or attempted escape beyond the jurisdiction of the offended state has just been made, that the act occurred and pursuit began within that jurisdiction, and that the pursuit and seizure beyond the marine league were parts of one continuing

act. A vessel once escaped cannot be seized at a later date upon the high seas.

As the pursuit and seizure referred to in the situation may be considered permissible under the circumstances which are duly ascertained after investigation, you do not interfere with the arrest of the vessel.

References bearing upon this subject will be found in the Appendix marked A.

The merchantman, although foreign built and not registered, is found to be American property by her papers, and hence by the Treasury and Consular regulations entitled to carry the American flag and to have protection, when lawfully engaged in trade, from the proper officials of the United States, in the same manner as if she were a regularly documented vessel of the United States. (See Appendix B).

This merchant vessel by her character and by her papers being entitled to carry the American flag, is entitled to carry that flag so long as she remains American property and until as a result of adjudication she is condemned and sold for violation of law; then as she changes ownership she may change nationality and flag. But before such a penalty can be adjudged, there must be a fair trial according to the laws of the place.

There is no right existing in accordance with international law under the circumstances as narrated permitting the substitution of the flag of the port for the legitimate flag of the vessel, and if the authorities of the United States decide that the vessel has a right to carry the American flag, no other persons have a right to question such privilege until the vessel is lawfully condemned and sold. The hauling down of the flag in the case under discussion is unjustifiable and an indignity, and should be met by a protest ashore and

afloat by the representatives of the United States, and the matter reported to the home government if redress is not at once given. (See Appendix C).

The seizure of a vessel of any kind or nationality in a foreign port and jurisdiction is a gross violation of the sovereignty of the country and an act of hostility bordering upon war. Especially is this the case when a vessel is held by the official authority of the country and undergoing trial by the legally constituted tribunals of the state. Such an order can only emanate from the President of the United States through the proper naval channels and in accordance with proper legislative action.

A diplomatic or consular official of the United States has no authority as such to give directions to naval officers. The Executive Departments are co-ordinate in authority and equal in standing; the diplomatic agent of the United States should work in unison with the naval commander, but has no right of command or direction. Cordial co-operation should be agreed upon, but the duties of each official are defined by statute and regulation and are independent of each other, each being responsible to his own department and superior, the President of the United States being a common superior to both, giving directions as a matter of usage and good administration through the head of the department to its subordinates.

In accordance with the regulations of the naval service the relations with the diplomatic authorities should be co-operative, due responsibility being attached to each official for any action of a joint or independent nature.

Under the circumstances you will be obliged to inform the minister that you do not feel justified in carrying

out his wishes which are only received as being in the nature of a request; but that you are ready and willing to co-operate with him in endeavoring to obtain proper treatment and fair trial for the merchant vessel by the authorities of the port. (See Appendix D).

The boats of a man-of-war have the same immunities in a foreign port that the vessel itself enjoys. There should be distinguishing colors displayed by each boat during the proper hours and at other times when necessary or advisable. No person from the shore has a right to board such boats without permission and an attack upon one of the crew and especially the petty officer in charge is inexcusable; the coxswain has a right to defend himself, while you have a cause for complaint to the authorities of the port against the offending person. The defence of the coxswain should be restricted to repelling the assault, and should not be retaliatory in its nature. The life of the boatman should not be unduly endangered and he should be picked up if there be danger from drowning. No person has a right to raise a disturbance in the ship or boats under your command and you have a right to expel the disturber.

No warrant for the arrest of an enlisted man on board your ship should have been issued by the local authorities, as they have neither a right by international law to make arrests on board of your ship or boats, nor to take legal cognizance of anything occurring within your command. It is your duty under the circumstances to refuse permission for the service of the warrant either on board ship or in the boats of the ship, whether in mid-harbor or lying at the landing place on shore.

If, however, the coxswain should be arrested on

shore, you cannot dispute the right to arrest within what is strictly the jurisdiction of this country, and if there is any dispute as to where the assault took place a trial is excusable under the circumstances. If it is conceded, however, by the local authorities, that the assault took place in your ship or boats, you should through the proper channels protest against the trial, as the immunity of your ship and boats from foreign jurisdiction or the jurisdiction of the port is universally conceded by the laws of nations, both in practice and theory. Under the circumstances as narrated you should request the discharge of your coxswain, which, if refused, should be a matter of diplomatic complaint. A trial should be at once asked for and given if his discharge be refused, and the course of the trial should be followed closely by a representative of the United States to make sure that it is fair and just. The arrest once made, the question becomes one between the two governments and under ordinary circumstances requires no further action upon your part beyond what has been stated. (See Appendix E).

DISCUSSION OF SITUATION NO. 2.

By the boundary lines now existing between Chile and the Argentine Republic, the waters of the Straits of Magellan fall within the limits of the Chilean Republic and may be considered in a general way as within their territorial jurisdiction, no protest to the contrary having been made by any civilized power so far as known.

The only settlement of civilized people on the shores

of the Straits of Magellan is the Chilian penal settlement at Sandy Point. In places the Straits of Magellan are less than six miles (less than one marine league from each side) in width.

Granting that the waters of the Straits can be considered as within the territorial bounds of Chile it is notwithstanding the practice and usage that when territorial waters are so situated that passage through is either necessary or convenient to the navigation of the seas they are subject to a right of innocent use by all nations for the purposes of commercial navigation. W. E. Hall says, concerning this, that "for more than two hundred and fifty years no European territorial marine waters which could be used as a thoroughfare, or into which vessels could accidentally stray or be driven, have been closed to commercial navigation and during the present century no such waters have been closed in any part of the civilized world. The right therefore must be considered to be established in the most complete manner."* This seems to be the almost unanimous opinion of modern writers upon international law.

The policy of the government of the United States has been consistent in the advocacy of the right of free commercial navigation both in waters claimed by Denmark and elsewhere. As to this particular right and locality a positive enunciation has been made by our State Department in a communication made to our minister resident in Chile, which can be found in the Appendix marked F.

With this right so plainly evident and under the circumstances, by which a commanding officer becomes vested with the duties of consular officer of the United States, you are justified and it becomes your duty to

*Hall, 3rd Ed'n., p. 157.

make free the navigation of the Straits to American merchant vessels by escorting them through, notifying at the same time the Chilean governor at Sandy Point that while you have the power you will take the responsibility of keeping the Straits open for commercial navigation. As a matter of international courtesy when appealed to by the foreign merchantmen you afford them every facility also for a free passage. The right of free navigation is a general and international one and vessels detained in the Straits of Magellan are subject to grave inconvenience and loss. The right of the use of territorial waters may be denied under certain circumstances to vessels of war but not to merchant-men and the governor at Sandy Point is mistaken in his rule and exceptions.

Upon the grounds of courtesy and humanity you offer and give all possible assistance to the governor during the time of threatened attack by the savages of that portion of Patagonia. At his request you land what force is available for this purpose.

As to the Americans residing at Sandy Point who are also property owners, and who fail to see the natural and moral obligation resting upon them to assist in the defense of the place and their own lives and property, your attitude towards them should be decided in its nature. For the defense of a place against savages, or against any force opposed to order and civilization, the governor has a right and duty to call upon all residents, aliens or otherwise, to assist in the protection of the community and the maintenance of good order and public safety. The resident aliens are entitled to receive police and other protection for their lives and property and in turn it becomes their duty to assist in measures taken for the common defence

against savages and for the preservation of the lives and property in the community threatened by foes to civilization.

An exemption from police duties is sometimes provided for citizens or subjects domiciled in foreign countries, but this is not a case for such exemption, and no treaty of this kind exists so far as is known between Chile and the United States.

Bluntschli as quoted by Hall gives the most sensible rules and usages upon the subject. (See Appendix G).

With the arrival of naval and military reinforcements to the colony from Chile the governor is enabled to take a firmer tone. With a declaration of martial law or state of siege as it is more generally called in Latin countries, the commander of the place is judge of what may be considered necessary for the public safety, and the necessity and emergency is sufficient as a reason for the seizure of private property of any resident, whether alien, or subject, for military purposes. Under these circumstances, with or without the promise of compensation and indemnity, the property of the American residents may be taken for the common good.

Any resistance to the government is unjustifiable and from motives of self preservation and order the Chilean military authorities may take such measures to suppress and punish resistance to legal authority as the circumstances justify. The rule of the commander is absolute under the circumstances tempered only by the humane demands of the times and the fair treatment due to residents, alien or otherwise. The conduct of the Americans under the circumstances is unjustifiable and should receive no countenance or support from you as naval commander or representative

of the United States. (See Appendix H and I).

The action of the Chileans in requesting your departure from the port and anchorage of Sandy Point is distinctly of an unfriendly nature. Legally and technically they have a right to absolute control over their ports and anchorages, but with a usage and permission to the contrary so long in existence, a request or direction of the nature referred to becomes a gross violation of international courtesy and comity. Such exceptional action is almost an act of hostility and becomes the more pointed as it is directed against a vessel of war of the United States alone.

The abstract right however is undoubted, and the United States by executive proclamation and statute law provides for such action of exclusion in the case of violation of its laws and jurisdiction and of the neutrality obligations by foreign vessels of war. (See Appendix K and L).

The use of the Straits of Magellan by foreign men-of-war in peace time has never been disputed. The case of the Dardanelles and the Bosphorus is different, the practice of denying the use of those waters to foreign vessels of war being recognized by treaty among European nations; and though our own policy as a nation is adverse to such restriction, we do not assert by force or otherwise our dissenting opinion. Though the right of innocent passage by men-of-war through straits or territorial waters is not considered by writers upon international law to rest upon the same grounds and with the same strength as in the case of merchant vessels, still the established practice has been of such duration from the time of the first discovery of these Straits that reasons should be demanded for such action; and if their gravity should

not be deemed sufficient to justify such a denial of hospitality in waters so remote and regions so stormy, then it becomes your duty before departure to make a protest against such action.

Having insufficient force, you then retire, and proceed to Montevideo where you report the circumstances to the Department and await further instructions.

It is natural to expect that our government will demand reasons for such unfriendly action, emanating as it apparently does from the home government of Chile. Furthermore it does not seem possible that it will rest content until the freedom of passage and general neutralization of the Straits is fully conceded by the government of Chile. As the Straits at present stand somewhat in the same relations as an interoceanic canal may in the future, this circumstance should not be ignored. Joint international action may be deemed desirable in the case of the Straits however, and may not be requested in the case of the canal.

APPENDIX.

SITUATION NO. I.

A.—“It has been mentioned that when a vessel, or some one on board her, while within foreign territory commits an infraction of its laws she may be pursued into the open seas, and there arrested. It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised. The restriction of the permission within the bounds stated may readily be explained by the abuses which would spring from a right to waylay and bring in ships at a subsequent time, when the identity of the vessel or of the persons on board might be doubtful.”

W. E. Hall, *International Law*, 3d Ed., p. 252; Bluntschli, § 342; Woolsey, § 58.

B.—In the U. S. Consular Regulations for 1888 is found the following:

“§ 317. The privilege of carrying the flag of the United States is under the regulation of Congress, and it may have been the intention of that body that it should be used only by regularly-documented vessels.

No such intention, however, is found in any statute. And as a citizen is not prohibited from purchasing and employing abroad a foreign ship, it is regarded as reasonable and proper that he should be permitted to fly the flag of his country as an indication of ownership, and for the due protection of his property. The practice of carrying the flag by such vessels is now established. The right to do so will not be questioned, and it is probable that it would be respected by the courts.

“§ 318. It should be understood, however, that such foreign-built vessels not registered, enrolled, or licensed under the laws of the United States, although wholly owned by citizens thereof, cannot legally import goods, wares, or merchandise from foreign ports, and are subjected in the coasting trade to disabilities and exactions from which documented vessels of the United States are exempt.”

The papers carried by such vessels consist of the bill of sale accompanied by a certificate from the U. S. Consul or Collector of Customs at whose office the bill of sale was recorded.

C.—“When a vessel is captured, the rule is to bring her into some convenient port of the government of the captor for adjudication.” The mere fact of capture does not work a transfer of title, and until there is a sentence of condemnation or restitution, the captured vessel is held by the government in trust for those who, by the decree of the court, may have the ultimate right to it.

“The Nassau, 4 Wall, 634.”

“No title to a captured vessel and cargo passes to the captors till a sentence of condemnation has been passed by a court having jurisdiction.”

3 Op. 317, Grundy, 1838.

Wharton's Digest, Vol. III, pp. 189, 191.

D.—“ART. 280. 1. He (the Commander in chief) shall preserve, so far as possible, the most cordial

relations with the diplomatic and consular representatives of the United States in foreign countries and extend to them the honors, salutes, and other official courtesies to which they are entitled by these regulations.

“2. He shall carefully and duly consider any request for service or other communication from any such representative.

“3. Although due weight should be given to the opinions and advice of such representatives a commanding officer is solely and entirely responsible to his own immediate superior for all official acts in the administration of his command.

“ART. 281. He will, as a general rule, when in foreign ports, communicate with local civil officials and foreign diplomatic and consular authorities through the diplomatic or consular representative of the United States on the spot.

“ART. 284. On occasions where injury to the United States or to citizens thereof is committed or threatened, in violation of the principles of international law or treaty rights, he shall consult with the diplomatic representative or consul of the United States, and take such steps as the gravity of the case demands, reporting immediately to the Secretary of the Navy all the facts. The responsibility for any action taken by a naval force, however, rests wholly upon the commanding officer thereof.”

U. S. Navy Regulations, 1893.

E.—“ART. 409. He shall not permit any ship of the navy under his command to be searched by any person representing a foreign state, nor any of the officers or crew to be taken out of her, so long as he has the power to resist. If force is used, it must be repelled.

“ART. 410. 2. The boats of a ship of war will be regarded in all matters concerning the rights, privileges, and comity of nations as parts of the ship herself.”

U. S. Navy Regulations, 1893.

See also Halleck, Vol. I, pp. 176, 180, 181, 190; Note 63, Dana's edition of Wheaton, as follows:—"It may be considered as established law, now, that the public vessels of a foreign State, coming within the jurisdiction of a friendly State, are exempt from all forms of process in private suits. Nor will such ships be seized, or in any way interfered with, by judicial proceedings in the name and by authority of the State, to punish violations of public laws. In such cases, the offended State will appeal directly to the other sovereign."

See also Wharton's Digest, Vol. I, p. 139; Phillimore, Vol. I, pp. 476-483; Snow's Cases, pp. 103-120; W. E. Hall, International Law, 3d Ed., pp. 191-195.

SITUATION NO. 2.

F.—Secretary Evarts to Mr. Osborn, Jan. 18, 1879: "The Government of the United States will not tolerate exclusive claims by any nation whatsoever to the Straits of Magellan, and will hold responsible any Government that undertakes, no matter on what pretext, to lay any impost or check on United States commerce through those straits." Wharton's Digest, Vol. I, p. 80.

G.—"It is more reasonable, and more in accordance with general principle, to say, as is in effect said by M. Bluntschli, that—

"1. It is not permissible to enroll aliens, except with their own consent, in a force intended to be used for ordinary national or political objects.

"2. Aliens may be compelled to help to maintain social order, provided that the action required of them does not overstep the limits of police, as distinguished from political, action.

"3. They may be compelled to defend the country

against an external enemy when the existence of social order or of the population itself is threatened, when, in other words, a state or part of it is threatened by an invasion of savages or uncivilized nations."

Hall, International Law, 3d Ed., pp. 205-206.

H.—"When strangers enter a state they must be prepared for the risks of intestine war, because the occurrence is one over which from the nature of the case the government can have no control; and they cannot demand compensation for losses or injuries received, both because, unless it can be shown that a state is not reasonably well ordered, it is not bound to do more for foreigners than for its own subjects, and no government compensates its subjects for losses or injuries suffered in the course of civil commotions, and because the highest interests of the state itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a foreign state.

"Foreigners must in the same way be prepared to take the consequences of international war."

Hall, 3d Ed., p. 219. See also Bluntschli, § 380 bis.; Calvo, 4th Ed., Vol. III, pp. 142-156.

I.—"The legal aspect of this condition of affairs in states which recognize the existence of this kind of martial law can hardly be better given than by citing some of the provisions of the law which at the present day regulates the state of siege in France:

"7. *Aussitôt l'état de siège déclare, les pouvoirs dont l'autorité civile était revêtue pour le maintien de l'ordre et de la police passent tout entiers à l'autorité militaire. L'autorité civile continue néanmoins à exercer ceux de ces pouvoirs dont l'autorité militaire ne l'a pas dessaisie.*

"8. *Les tribunaux militaires peuvent être saisis de la connaissance des crimes et délits contre la sûreté de la République, contre la constitution, contre l'ordre*

et la paix publique, quelle que soit la qualite des auteurs principaux et des complices."

A. V. Dicey's Law of the Constitution, p. 299.

K.—Sec. 5288. "It shall be lawful for the President, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any foreign vessel to depart from the United States in all cases in which, by the laws of nations or the treaties of the United States, she ought not to remain within the United States."

Revised Statutes of the United States. See also Hall, 3d Ed., p. 192.

L.—"If, for reasons of State, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or against the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain, under the protection of the government of the place.

* * * * *

"If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived for distinguishing their case from that of vessels which enter by express assent."

Wheaton's International Law, Dana's Ed., p. 159. See also pp. 153, 532 of the same work; and Wharton's Digest, § 34, Vol. I.

